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No. 08-322

IN THE
Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE,

Appellant,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF *AMICUS CURIAE* OF THE SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF APPELLANT

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INTEREST OF AMICUS CURIAE[1]

Southeastern Legal Foundation ("SLF"), founded in 1976, is a national non-profit, public interest law firm and policy center that advocates constitutional individual liberties and free enterprise in the courts of law and public opinion. SLF drafts legislative models, educates the public on key policy issues and litigates regularly before the Supreme Court of the United States. In particular, SLF advocates for a color-blind interpretation of the Constitution. To that end, SLF has participated in litigation all over the country including in this Court in such cases as *City of Richmond v. J.A. Croson Co.*, 488 U.S. 49 (1989), *Ne. Fla. Ch. of Assoc. Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656 (1993) and *Adarand v. Mineta*, 534 U.S. 103 (2001).

SLF has a direct interest in this case, as it objects to the 2006 reauthorization of Section 5 of the Voting Rights Act on the basis that it runs contrary to the principles of race neutrality to which it is dedicated and to the American ideal of individual equality to which SLF is profoundly committed. For these reasons, SLF respectfully submits this brief in support of Appellant and urges the Court to reverse the judgment below.

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents are being lodged herewith.

INTRODUCTION

This appeal arises out of the district court's determination that (1) Appellant Northwest Austin Municipal Utility District Number One is not entitled to "bail out" of coverage under Section 5 of the Voting Rights Act ("VRA"), 42 U.S.C. § 1973c; and (2) Section 5 of the VRA is a constitutional exercise of Congress' power under Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment. *See Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221 (D.D.C. 2008) ("*NAMUDNO*"). As Appellant has persuasively demonstrated, Section 5 "continues to impose an unparalleled federal intrusion on the contemporary generation in certain parts of the country" that—for numerous reasons taken both individually and together—cannot withstand constitutional muster. Brief of Appellant at 2, *Northwest Austin Municipal Utility District Number One v. Holder* (No. 08-322) (Feb. 19, 2009) ("App. Br."). Moreover, Appellant has shown that it should be fully entitled to bail out of Section 5 coverage under any reasonable—and constitutional—reading of the statute. *See id.* at 14-27.

Amicus SLF fully subscribes to the arguments made in the Appellant's brief, but writes separately to emphasize one particularly troubling and constitutionally suspect aspect of the 2006 reauthorization of Section 5: the scant evidentiary record allegedly supporting reauthorization bears no resemblance to the extraordinary factual record that was necessary to support Section 5 at its initial enactment. Congress' failure to compile the factual

record required by this Court's precedents interpreting congressional power to enact "enforcement" legislation under Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment, and its concomitant failure to tailor any remedial scheme to account for the factual differences that do exist, render Section 5 constitutionally unsustainable.

The Civil War Amendments provide individuals with a substantive guarantee, but they also provide Congress with an extraordinary power: to "enforce" those Amendments' substantive guarantees through "appropriate legislation." *See* U.S. Const. amends. XIV § 5, XV § 2. This power, while broad, "is not unlimited." *Oregon v. Mitchell*, 400 U.S. 112, 128 (1970). Thus, virtually since the time the Amendments were enacted, this Court has carefully scrutinized each such exercise of congressional power to determine whether Congress is actually "enforcing" the rights granted in the Amendments or is instead "changing what the right is." *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

Congress enacted the VRA to enforce the substantive guarantee of the Fifteenth Amendment—"to banish the blight of racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). The "preclearance" procedure set out in Section 5 of that Act, however, was only one part of the VRA's "complex scheme of stringent remedies aimed at areas where voting discrimination ha[d] been most flagrant."[2]

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2. The central enforcement provision in the VRA is Section 2, 42 U.S.C. § 1973a. Section 2 and Section 5 "combat different (Cont'd)

Id. at 315. Indeed, it was designed with the singular purpose of foreclosing the use of obstructionist tactics and discriminatory devices to evade court judgments enforcing the Fifteenth Amendment. *See id.* at 309 (citing the "insidious and pervasive evil which had been perpetrated in certain parts of our country through unremitting and ingenious defiance of the Constitution"). Prior to Section 5, nothing prevented State and local officials from implementing new intentionally discriminatory voting laws as a means of evading court orders and decrees. Congress thus enacted Section 5 as an anti-evasion provision to end this practice. *See* S. Rep. No. 89-162, at 33 (1965) (there was "little basis for supposing that without action, the States and subdivisions affected will themselves remedy the present situation").

Despite these noble goals, the Court did not allow Section 5 to escape close scrutiny. Adhering closely to analyses conducted in reviewing other "enforcement" legislation, the Court reviewed the evidence on which Congress relied to justify the need for the VRA in

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evils and, accordingly, impose very different duties upon the States." *Reno v. Bossier Parish*, 520 U.S. 471, 477 (1997) ("*Bossier Parish I*"). Section 2 is directed at existing voting practices that "minimize or cancel out the voting strength and political effectiveness of minority groups." S. Rep. No. 97-417 at 28, 1982 USCCAN 177, 205 (1982). Section 2 also applies nationwide, "was an uncontroversial provision in proposed legislation whose other provisions engendered protracted dispute," *City of Mobile v. Bolden*, 446 U.S. 55, 61 (1980), and is not at issue in this appeal except to the extent that its presence undermines the need for the extraordinary Section 5 remedy.

general and Section 5 in particular and held Congress responsible for tailoring any legislation to target only those areas where "enforcement" legislation was "appropriate." Thus, although Section 5's remedial provision was "an uncommon exercise of congressional power," *Katzenbach*, 383 U.S. at 334, and represented "an extraordinary departure from the traditional course of relations between the States and the Federal Government," *Presley v. Etowah County*, 502 U.S. 491, 500-501 (1992), the Court found it justified because Congress had compiled a vast record disclosing the unflinching resistance of certain states to permit minority citizens to register and vote, focusing in particular on statistical evidence showing gross disparities between the ability of African-Americans and whites to exercise the franchise. *Katzenbach*, 383 U.S. at 334. The Court also found Section 5 sustainable because it was targeted only at those areas where remedial action was the most appropriate and only for a limited period of time. *See id.* at 314, 328, 330.

Following subsequent reauthorizations in 1970, 1975, and 1982, *see* Pub. L. No. 91-285, 84 Stat. 314 (1970); Pub. L. No. 94-73, 89 Stat. 402 (1975); Pub. L. No. 97-205, 96 Stat. 131 (1982), during which time this Court repeatedly acknowledged the substantial costs Section 5 imposes on our federal system,[3] Congress

3. *See also Berry v. Doles*, 438 U.S. 190, 200-201 (1978) (Powell, J., concurring) ("It must be remembered that the [VRA] imposes restrictions unique in the history of our country on a limited number of selected States."); *Miller v. Johnson*, 515 U.S. 900, 926 (1995) (emphasizing the "federalism costs exacted by

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again reauthorized Section 5 in 2006. *See* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act and Reauthorization Amendments of 2006, Pub. L. No. 109-246, 120 Stat. 577 (2006). In adding another 25 years to Section 5's life, however, Congress did not heed the warnings implicit in this Court's enforcement clause precedents by compiling the necessary evidence or tailoring the remedy to fit a demonstrated problem.

Indeed, the 2006 reauthorization and the evidence Congress marshaled to support it make clear that Section 5 has come completely untethered from its foundation. Congress offered no evidence of the continued use of literacy tests, poll taxes, or other "tests and devices" that the *Katzenbach* Court found "relevant to voting discrimination because of their long history as a tool for perpetrating the evil." *Katzenbach*, 383 U.S. at 330. Nor did Congress offer evidence to support its conclusory assertions that the covered jurisdictions would, in the absence of Section 5, revert back to the "extraordinary stratagem" of perpetuating voting discrimination by crafting new voting laws around federal court rulings. To the contrary, the congressional

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(Cont'd)

§ 5 preclearance"); *Bossier Parish I*, 520 U.S. at 480 (noting the "serious federalism costs already implicated by § 5 preclearance"); *Lopez v. Monterey County*, 525 U.S. 266, 282 (1999) ("[T]he Act, which authorizes federal intrusion into sensitive areas of state and local policymaking, imposes substantial federalism costs.") (quotations omitted); *Reno v. Bossier Parish*, 528 U.S. 320, 336 (2000) ("*Bossier Parish II*") (highlighting the "substantial federalism costs that the preclearance procedure . . . exacts").

record contained compelling statistical evidence demonstrating significant progress in minority voting rights, including dramatic increases in voter registration and turnout in covered jurisdictions and dramatic decreases in the disparities between minority and white voter registration and turnout in those jurisdictions.

While Congress did compile some evidence in an attempt to justify its actions, the evidence it gathered wholly failed to disclose a pervasive practice of constitutional violations by state actors. Nor did the congressional record disclose evidence of states flouting the Constitution through obstructionist tactics and discriminatory devices designed to evade standing court judgments enforcing the Fifteenth Amendment. In the end, the present record bears no resemblance to the record initially supporting Section 5, and is plainly insufficient to sustain Section 5's extraordinary remedy.

Congress also wholly failed to satisfy the second part of its responsibility under this Court's precedents: to tailor any legislation it did enact. In contrast to the process Congress undertook when originally enacting Section 5 in 1965, in reauthorizing Section 5 Congress did not target only those States with the worst voting records, did not consider the sufficiency of narrower remedies, and did not provide any meaningful temporal limitation.

The method by which this Court has analyzed prior enforcement legislation demonstrates the constitutional infirmity of present-day Section 5. Had Congress paid more attention to its evidentiary and tailoring responsibilities, it would have allowed Section 5 to

sunset or modified its scope to account for the vast changes in the voting landscape since 1965. It did neither, and this Court should find Section 5 unconstitutional.

ARGUMENT

I. SECTION 5 IS JUSTIFIABLE ONLY UNDER THE EXTRAORDINARY CIRCUMSTANCES THAT LED TO ITS ENACTMENT.

A. This Court's Decisions Dictate That Enforcement Legislation Must Be Subjected to Stringent Review to Determine its Necessity.

The Fifteenth Amendment to the United States Constitution contains an important substantive guarantee: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1. But of special importance to this case, it also grants Congress the power to "enforce" that guarantee "by appropriate legislation." U.S. Const. amend. XV, § 2. This extraordinary "enforcement" power—granted to Congress in each of the Civil War Amendments—overrides traditional deference to state sovereignty within the federal system.

Though this grant of power could have been interpreted as unreviewable, this Court made clear early on that Congress did not have free rein in crafting "enforcement" legislation. *See, e.g.*, *Ex parte Virginia*, 100 U.S. 339 (1879) (stating that "enforcement"

legislation must be "appropriate," which requires that it be "adapted to carry out the objects the amendments have in view" and that they "tend[] to enforce submission to the prohibitions they contain"). Indeed, scarcely more than a decade after the Civil War Amendments were enacted, this Court found legislation enacted under the enforcement clause of the Fourteenth Amendment was both subject to judicial review and unconstitutional. *See Civil Rights Cases*, 109 U.S. 3 (1883). In those cases, the Court laid down the groundwork for review that has been followed in subsequent decisions, finding that Congress must compile a factual record showing a particularized need for the legislation, and that the factual record must disclose evidence of violations of the substantive guarantees of the particular amendment that Congress seeks to enforce. *Id.* at 14 (finding Congress' reliance on its enforcement clause power unjustified where "[a]n inspection of the law shows that it makes no reference whatever to any supposed or apprehended violation of the fourteenth amendment on the part of the states").

In *Katzenbach*, the Court, in reviewing the constitutionality of the VRA, again demonstrated that it will give close attention to the particular evidence relied upon by Congress to justify its actions under the enforcement clauses. In upholding Section 5's constitutionality, this Court looked closely at the facts Congress had assembled, highlighting the "exceptional conditions" and "unique circumstances" surrounding enactment as support for its constitutionality. 383 U.S. at 334-35. In the end, the Court found that Congress had compiled sufficient evidence to show that enforcement legislation was appropriate, including vast

amounts of evidence of conduct violating the Fifteenth Amendment. Thus, the "exceptional conditions c[ould] justify legislative matters not otherwise appropriate." *Id.* at 334.

Since *Katzenbach*, this Court has held true to the analytic framework first laid down in the *Civil Rights Cases*, subjecting enforcement legislation to scrutiny not applicable to other congressional enactments. In the second constitutional challenge to Section 5, this Court again specifically examined the evidence adduced by Congress to justify Section 5's reauthorization, finding it to be similar in nature to that relied upon to initially justify Section 5. *See City of Rome v. United States*, 446 U.S. 156, 180-82 (1980). Writing in that case, then-Justice Rehnquist remarked that the Court's enforcement clause precedents "are carefully formulated around a historic tenet of the law that in order to invoke a remedy, there must be a wrong—and under a remedial construction of congressional power to enforce the Fourteenth and Fifteenth Amendments, that wrong must amount to a constitutional violation." *Id.* at 213 (Rehnquist, J., dissenting).

In *Boerne*, the Court again acknowledged the requirement that Congress compile specific types of evidence, noting that congressional action is only appropriate under the enforcement clauses where it "deters or remedies constitutional violations." 521 U.S. at 518. Indeed, the *Boerne* Court closely examined the precise facts on which Congress relied to support the need for the Religious Freedom Restoration Act ("RFRA")—including whether any unconstitutional conduct was alleged—and compared the lack of factual

evidence in that case to the wealth of evidence compiled to support the VRA in *Katzenbach*. *Id.* at 530-32. Subsequent decisions have applied this strict evidentiary requirement to the review of every piece of enforcement legislation. *See*, *e.g.*, *Bd. of Trs. of U. of Ala. v. Garrett*, 531 U.S. 356, 368 (2001) (noting that the Court must "examine whether Congress identified a history and pattern of unconstitutional" action in order to justify "enforcement" legislation since "Congress' § 5 authority is appropriately exercised only in response to state transgressions") (citing *Fla. Prepaid Post-Secondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 640 (1999); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 89 (2000)).

B. Congress Must Meaningfully Limit the Scope of Enforcement Legislation.

The principle that Congress may only respond to some constitutional "wrong" imposes a correlative limitation on "enforcement" legislation: it must be closely tailored to the particular facts justifying its enactment. In the *Civil Rights Cases*, this Court objected to the law in question in part based on a failure to limit its geographical reach: it "applie[d] equally to cases arising in states which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws as to those which arise in states that may have violated the prohibition of the amendment." 109 U.S. at 14. The Court engaged in a similar analysis in *Katzenbach*, considering the temporal limitation of Section 5 (five years), the fact that less intrusive remedies had failed, and Section 5's limited geographic scope (only those jurisdictions showing the most egregious record of constitutional violations) as factors favoring its constitutionality. *See* 383 U.S. at 313-14, 328.

And in *Boerne*, the Court explicitly stated that enforcement legislation must, over time, "be adapted to the mischief and wrong which the Amendment was intended to provide against." 521 U.S. at 532. Accordingly, the Court found it relevant that RFRA had no termination date and applied equally across the country despite a lack of findings of constitutional violations nationwide, *id.* at 532-33, explaining that "[w]here . . . a congressional enactment pervasively prohibits constitutional state action in an effort to remedy or to prevent unconstitutional state action, limitations of this kind tend to ensure Congress' means are proportionate to ends legitimate." *Id.* at 533. *See also Garrett*, 531 U.S. at 372-74 (lack of geographic limitation demonstrated lack of tailoring). In a like manner, the Court has found congressional efforts to consider less intrusive remedies to be an important factor in analyzing the constitutionality of enforcement legislation. *See*, *e.g.*, *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 738-39 (2003).

C. Section 5 Was Constitutional At Its Enactment Only Because of Extraordinary Circumstances.

Using these principles to scrutinize Section 5, the *Katzenbach* Court found that the factual record Congress compiled clearly demonstrated the necessity of enforcement legislation. The vast record of discriminatory conduct demonstrated the naked desire of certain states to deprive African-Americans the ability to vote. Following passage of the Fifteenth Amendment, many Southern states responded by enacting numerous tests and devices—such as white primaries, poll taxes, and literacy tests—designed to deny African-Americans

of the right to vote. *See Katzenbach*, 383 U.S. at 311-12. The Court explained that literacy tests were one of the primary mechanisms[4] used to deny the franchise to African-Americans because of the wide disparity in literacy rates between African-Americans and whites at the time. *Id.* at 310-11. At the same time, those states enacted laws to protect illiterate whites' right to vote, including "grandfather clauses, property qualifications, 'good character' tests, and the requirement that registrants 'understand' or 'interpret' certain matter." *Id.* at 311. To make matters worse, the states administered these tests in a discriminatory fashion. *Id.* at 312-13; *see also Rice v. Cayetano*, 528 U.S. 495, 513 (2000) ("Though the commitment [of the Fifteenth Amendment] was clear, the reality remained far from the promise. Manipulative devices and practices were soon employed to deny the vote to blacks." (citing *Katzenbach*, 383 U.S. at 311-12)).[5]

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4. Literacy tests were employed in Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia. *Katzenbach*, 383 U.S. at 310.

5. Senator Ben Tillman, the "dominant political figure" in the South Carolina Constitutional Convention of 1895, explained the aim of literacy tests as follows: "'[T]he only thing we can do as patriots and as statesmen is to take from [the 'ignorant blacks'] every ballot that we can under the laws of our national government.'" *Katzenbach*, 383 U.S. at 310 n.9 (quoting Journal of the Constitutional Convention of the State of South Carolina 464 (1895)). The *Katzenbach* Court noted that "[h]e was equally candid about the exemption from the literacy test for persons who could 'understand' and 'explain' a section of the state constitution: 'There is no particle of fraud or illegality in it. It is just simply showing partiality, perhaps, [laughter,] or discriminating.'" *Id.*

Over the years, this Court had struck down many of these "tests and devices" as unconstitutional, *see Katzenbach*, 383 U.S. at 311-12, but this was insufficient to ensure equal access to the polls. Thus, beginning in 1957, Congress enacted several statutes designed to "facilitat[e] case-by-case litigation against voting discrimination." *See id.* at 313. But this too proved "ineffective for a number of reasons." *Id.* at 314. In particular, litigation of voter discrimination cases "ha[d] been exceedingly slow, in part because of the ample opportunities for delay afforded voting officials and others involved in the proceedings." *Id.* And even when such cases resulted in favorable decisions, "some of the States affected . . . merely switched to discriminatory devices not covered by the federal decrees or . . . enacted difficult new tests designed to prolong the existing disparity between white and Negro registration." *Id.* Other localities simply "defied and evaded court orders" or "closed their registration offices to freeze voting rolls." *Id.*; *see also* House Committee Hearings at 5 (1965) (Statement Of The Honorable Nicholas deB. Katzenbach, Attorney General Of The United States) ("Three times since 1956, the Congress has responded. Three times, it has adopted the alternative of litigation, of seeking solutions in our judicial system. But three times since 1956, we have seen that alternative tarnished by evasion, obstruction, delay, and disrespect."); Oral Argument Tr. at 47, *Riley v. Kennedy*, 128 S. Ct. 1970 (No. 07-77) (2008) (comparing the Section 5 problem to a "game of Whac-A-Mole").

It was in response to this "extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the

face of adverse federal court decrees" that Congress enacted Section 5. *Katzenbach*, 383 U.S. at 335; *see also id.* at 311 (cataloguing the "variety and persistence" of unlawful voting techniques); *id.* at 309 n.5 (citing Warren M. Christopher, *The Constitutionality of the Voting Rights Act of 1965*, 18 Stan. L. Rev. 1, 10 (1965) ("In the past those intent on denying the rights guaranteed by the fifteenth amendment have managed to avoid court decrees and legislation by contriving new stratagems.")). The Court endorsed Congress' determination that "covered jurisdictions" would continue to "try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself," *id.*, and thus "case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting," *id.* at 328. *See also id.* (describing the "inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in [voting discrimination] lawsuits").

Importantly, the *Katzenbach* Court highlighted the inadequacy of the case-by-case approach by presenting a wealth of statistical evidence regarding (1) voter registration rates, and (2) voter turnout levels, both of which demonstrated continuing and pervasive voter discrimination. The Court highlighted evidence the Attorney General presented to Congress showing that African-American voter registration rates ran *approximately 50 percentage points lower* than white voter registration in several states. *See id.* at 313. The persistence of such wide disparities demonstrated that discrimination was widespread. The Court also noted concrete examples, showing that registration rates of

African-Americans in Alabama rose "only from 14.2% to 19.4% between 1958 and 1964; in Louisiana it barely inched ahead from 31.7% to 31.8% between 1956 and 1965; and in Mississippi it increased only from 4.4% to 6.4% between 1954 and 1964." *Id.* at 313. The absence of progress and the failure to remedy these wide disparities demonstrated that a new approach was necessary. Finally, the Court observed that voter turnout levels in "covered jurisdictions" were at least 12 points below the national average in the 1964 presidential election. *Id.*; *see also* H.R. Rep. No. 91-397, 1970 USCCAN 3277, 3278 (1969) (finding that the three prior civil rights acts "yielded insignificant gains in the non-white voter registration").

Overall, the *Katzenbach* Court considered these statistics, along with the continued "use of tests and devices," to be "evidence of actual voting discrimination." 383 U.S. at 330. *See also id.* ("Tests and devices are relevant to voting discrimination because of their long history as a tool for perpetrating the evil; a low voting rate is pertinent for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters."). At bottom, Section 5 was necessary because "minorities were openly denied the right to participate in the political process by State and local officials." H.R. Rep. No. 109-478, at 7 (2006).

Finally, Congress recognized that its authority to enforce the Fifteenth Amendment only goes so far. In contrast to the law at issue in the *Civil Rights Cases*, the Court found that Section 5 applied only in those places where evidence of persistent, purposeful discrimination existed. *Compare* 383 U.S. at 330 ("It

was . . . permissible to impose the new remedies on the few remaining [covered jurisdictions], at least in the absence of proof that they have been free of substantial voting discrimination in recent years."), *with Civil Rights Cases*, 109 U.S. at 14 (finding the law unconstitutional where "[i]t applies equally to cases arising in states which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws as to those which arise in states that may have violated the prohibition of the amendment."). Likewise, Congress understood that Section 5 was to be a temporary measure that would last only as long as the conditions making it necessary existed: "When the Voting Rights Act was enacted in 1965, the Congress expected that within a 5-year period negroes would have gained sufficient voting power in the states affected so that special federal protection would no longer be needed." H.R. Rep. No. 91-397, 1970 USCCAN at 3281. Such awareness of the bounds of the power to "enforce" was again found to be an important aspect of the Court's determination.[6]

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6. In the years since *Katzenbach*, this Court has reiterated several times that the decision as to Section 5's constitutionality hinged upon this extraordinary factual record. Indeed, this Court's decisions make clear that Section 5 was only justified as a response to the pervasive voting discrimination that had been perpetuated by covered jurisdictions' "extraordinary stratagem" of "contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees." *Miller*, 515 U.S. at 926; *see also Garrett*, 531 U.S. at 373; *City of Rome*, 446 U.S. at 174; *Allen v. State Bd. of Elections*, 393 U.S. 544, 556 n.21 (1969).

II. IN REAUTHORIZING SECTION 5 WITHOUT ANY MEANINGFUL LIMITATIONS, CONGRESS ACTED OUTSIDE ITS ENFORCEMENT POWER.

In reauthorizing Section 5 in 2006, Congress was again required to compile evidence showing continuing unconstitutional behavior on the part of the States and to tailor its remedy to the particular covered evils. While Congress collected a large volume of evidence, it utterly failed to collect the *kind* of evidence that this Court has insisted upon in its enforcement clause cases—*i.e.*, evidence of constitutional violations. Likewise, it made virtually no attempt to examine the bounds of its enforcement authority and to limit the scope of any legislation it did enact accordingly. Thus, it is plain that Section 5 cannot withstand constitutional scrutiny.

A. Congress Failed to Compile the Factual Record Necessary to Justify Enforcement Legislation.

Contrasting the facts on which the *Katzenbach* Court relied to find Section 5 constitutionally justifiable with the contemporaneous evidence on which Congress relied to justify reauthorizing Section 5 in 2006, it becomes plain that Congress failed to compile the evidentiary record required under this Court's enforcement clause precedents. Indeed, Congress' audacious finding that the present record is similar to the record of widespread invidious discrimination before the Court in *Katzenbach* diminishes not only the great progress achieved under the VRA but also the degree of discrimination suffered by African-Americans prior to the VRA's enactment.

1. The Violations on Which the *Katzenbach* Court Relied No Longer Exist.

As discussed above, Section 5 was enacted to remedy the specific problem of States resorting to obstructionist tactics and discriminatory devices in order to evade judgments intended to enforce the Fifteenth Amendment. The result of such practices was the gross disparity in voter registration and turnout between African-Americans and whites, *see*, *e.g.*, *Katzenbach*, 383 U.S. at 313 (highlighting the 50-percentage-point disparity in registration rates between African-Americans and whites), which the Court considered to be "reliable evidence of actual voting discrimination." *Id.* at 329. However, the "exceptional conditions" and "unique circumstances" that justified Section 5's enactment in 1965 have changed dramatically, and the evidence the *Katzenbach* Court found instructive in upholding Section 5 in 1966 is now virtually non-existent.

Certainly long gone are the days of "grandfather clauses, property qualifications, 'good character' tests, and the requirement that registrants 'understand' or 'interpret' certain matter," *id.* at 311—*i.e.*, the types of discriminatory "tests and devices" that the *Katzenbach* Court found were "relevant to voting discrimination because of their long history as a tool for perpetrating the evil," *id.* at 330.[7] Indeed, "these violations occurred at least decades ago." Richard L. Hasen, *Congressional*

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7. *See also* H.R. Rep. No. 109-478, at 7 ("[T]he primary method of keeping minorities from participating in the election process was through the administration of State constitutional amendments and statutorily-authorized tests and devices, such as literacy tests, moral character requirements, and interpretation tests.").

Power to Renew the Preclearance Provisions of the Voting Rights Act After Tennessee v. Lane, 66 Ohio St. L.J. 177, 189 (2005)

Moreover, there is a complete lack of evidence of the "unremitting and ingenious defiance of the Constitution," *Katzenbach*, 383 U.S. at 309, that previously motivated this Court to uphold the "uncommon exercise of congressional power" embodied in Section 5, *id.* at 334. Notwithstanding Congress' conclusory and unsupported contention that it "knows from history that case-by-case enforcement alone is not enough to combat the efforts of certain States and jurisdictions to discriminate against minority citizens in the electoral process," H.R. Rep. No. 109-478, at 57, there is in fact no reason to believe that in the absence of Section 5, localities will revert to the "extraordinary stratagem" of tweaking laws found to be unconstitutional to force time-consuming litigation and perpetuate voter discrimination. Indeed, Congress itself noted that the extraordinary stratagems undertaken by covered States prior to Section 5's initial enactment were but relics of the past. *See* H.R. Rep. No. 109-478, at 12 ("The record reveals that many of the first generation barriers to minority voter registration and voter turnout that were in place prior to the VRA have been eliminated.").

Nor does statistical evidence of African-American disenfranchisement exist as it did at the time of *Katzenbach*. In the absence of discriminatory "tests and devices," African-American voter registration and turnout rates have skyrocketed. For example, according to the *Katzenbach* Court, the voter registration rate for African-Americans in Alabama in 1964 was 19.4%; in

Louisiana, it was 31.8%; and in Mississippi, it was 6.4%. 383 U.S. at 313. By 2004, the rates for Alabama, Louisiana, and Mississippi had jumped to 71.8%, 66.9%, and 72.2%, respectively.[8] *See* Appendix (hereafter "Appx.") at 6a. While the *Katzenbach* Court noted that in 1964, the "registration of voting-age whites ran roughly 50 percentage points or more ahead of Negro registration" in Alabama, Louisiana, and Mississippi, *Katzenbach*, 383 U.S. at 313, by 2004, the disparity between African-American and white voter registration had nearly vanished. *See* H.R. Rep. No. 109-478, at 12 ("The Committee finds that the number of African-Americans who are registered and who turn out to cast ballots has increased significantly over the last 40 years, particularly since 1982. In some circumstances, minorities register to vote and cast ballots at levels that surpass those of white voters."); *see also* App. Br. at 52-53. Indeed, by 2004, that disparity had dropped to 2.7% in Alabama and 8.1% in Louisiana. *See* Appx. at 6a. And in Mississippi, where African-American voter registration had lagged behind white registration by 50 percentage points in 1965, African-American voter registration *actually exceeded white voter registration by 1.5%. Id.*

Overall, in the states entirely covered by Section 5, African-American voter registration and turnout percentages are higher than whites' in three instances and on par with whites' in the remaining states; African-

8. Indeed, because "enforcement" legislation must be continually revisited to determine its current need, *see Boerne*, 521 U.S. at 533, 2008 voter registration statistics from several covered states demonstrate that there is even less justification for Section 5 today than there was in 2006. *See* Appx. at 2a.

Americans in these states have higher registration and turnout numbers than *any* racial group outside covered jurisdictions. *See* Charles S. Bullock III & Ronald Keith Gaddie, *The Bullock-Gaddie Voting Rights Studies: An Analysis of Section 5 of the Voting Rights Act* at 3-11, American Enterprise Institute (2006) ("Bullock & Gaddie"), *Addendum: Impact of Using Non-Hispanic White Data* (June 6, 2006); *Reauthorization of the Temporary Provisions of the Voting Rights Act* at 35-36, U.S. Commission on Civil Rights (April 2006); Edward Blum & Lauren Campbell, *Assessment of Voting Rights Progress in Jurisdictions Covered Under Section Five of the Voting Rights Act* at 4-5, American Enterprise Institute (May 17, 2006) ("Blum & Campbell"). *See also* H.R. Rep. No. 109-478, at 12 ("[T]he disparities between African-American and white citizens who are registered to vote have narrowed considerably in six southern States covered by the temporary provisions (Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia) and in the 40 counties covered in the State of North Carolina."); S. Rep. No. 109-295, at 10-11 (2006) (noting that "presently in seven of the covered States, African-Americans are registered at a rate higher than the national average," that in two more, African-American registration is "identical to the national average," and that in "California, Georgia, Mississippi, North Carolina, and Texas, black registration and turnout in the 2004 election . . . was higher than that for whites"); Appx. at 11a.[9]

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9. Early returns from the 2008 presidential election show that turnout rates have continued to increase. *See* Appx. at 3a, 11a.

Based on this record, the evidence on which the *Katzenbach* Court relied to support Section 5's constitutionality—statistical evidence of African-American disenfranchisement and the use of historically discriminatory "tests and devices"—simply did not exist in 2006. To the contrary, evidence was proffered that undermined the conclusion that pervasive voting discrimination continues. Accordingly, it is clear that "there is no crisis in minority voting rights in 2006 compared to what there was in 1965 when the act was passed or in subsequent years." Blum & Campbell at 2-3.

2. The Facts Upon Which Congress Relied to Renew Section 5 Are Constitutionally Insufficient.

Though there was no evidence justifying Section 5 as an anti-evasion provision, Congress determined that Section 5 was still necessary to accomplish other goals. But unlike the evidence relied upon in *Katzenbach* and other decisions upholding legislation enacted under the enforcement clauses, the evidence Congress relied on in 2006 utterly fails to show the pervasive pattern or practice of constitutional violations that is a necessary predicate to the enactment of such legislation.

a. Racially Polarized Voting

Congress cited "[t]he continued evidence of racially polarized voting in each of the jurisdictions covered by the expiring provisions of the Voting Rights Act of 1965" as a factor supporting reauthorization. Pub. L. No. 109-246 § 2(b)(3), 120 Stat. at 577. Congress has never explained, however, how racially polarized voting

is evidence of unconstitutional discrimination.[10] This is not surprising, given that this Court has explicitly found that racially polarized voting is *not* evidence of unconstitutional discrimination unless it is accompanied by evidence of discriminatory intent. *See Bolden*, 446 U.S. at 64 (citing *Smith v. Allwright*, 321 U.S. 649 (1944); *Terry v. Adams*, 345 U.S. 461 (1953)). By the same token, Congress and the courts may not look to the supposed motivation of the individual voters who instituted a particular scheme to find the necessary discriminatory intent. *See City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 195-96 (2003); *Bolden*, 446 U.S. at 94 (Stevens, J., concurring).

Nevertheless, the evidence shows that it is partisanship and incumbency status—not race—that plays the decisive role in the way that votes are cast on election day.[11] In most instances, the failure of African-

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10. The district court relied upon Congress' finding that racially polarized voting is a precondition to vote-dilution techniques. *NAMUDNO*, 573 F. Supp. 2d at 263-64 (citing H.R. Rep. No. 109-478, at 34-35). While this may be evidence of a continued need for Section 2, which is a permanent provision of the VRA, it provides no evidence in support of the need for Section 5.

11. *See* Bullock & Gaddie, Texas Report at 12, 17; Alabama Report at 12-14; Georgia Report at 30-33; Louisiana Report at 23-27; Mississippi Report at 11-15; South Carolina Report at 27-31; and Virginia Report at 11-15. Indeed, the evidence shows that white voters are much more likely to vote for Democrats (African-American or white) than African-American voters are to vote for Republicans of any race. *See*, *e.g.*, Mississippi Report at 11-15; South Carolina Report at 27; Virginia Report at 14-15. All reports available at http://www.aei.org/research/nri/subjectAreas/pageID.1140,projectID.22/default.asp.

American candidates to garner the majority support of white voters is mirrored by the failure of white Democrats to garner such support.[12]

b. Section 5 Enforcement

Congress relied upon "the hundreds of objections interposed, requests for more information submitted followed by voting changes withdrawn from consideration by jurisdictions covered by the Voting Rights Act of 1965, and section 5 enforcement actions . . . in covered jurisdictions since 1982" as evidence of "discrimination." Pub. L. No. 109-246 § 2(b)(4)(A), 120 Stat. at 577. Similarly, Congress relied upon "the number of requests for declaratory judgments denied by the United States District Court for the District of Columbia." Pub. L. No. 109-246 § 2(b)(4)(B), 120 Stat. at 577. There are several reasons that such evidence does not serve as an apt proxy for intentional discrimination.

Section 5's standard prohibits much more than the intentionally discriminatory conduct which creates a

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12. Neither Congress nor the court below recognized the disconnect between decrying racially polarized voting while at the same time complaining of failures to draw majority-minority districts to insulate African-American and white voters from one another and presuming that a particular minority group has a single "candidate of choice" that is necessarily different from that of white voters. *See Bolden*, 446 U.S. at 88 (Stevens, J., concurring) ("[T]here is no more certainty that individual members of racial groups will vote alike than that members of other identifiable groups will do so. And surely there is no national interest in creating an incentive to define political groups by racial characteristics.").

constitutional violation. Indeed, between this Court's rulings in *Beer v. United States*, 425 U.S. 130 (1976), and *Georgia v. Ashcroft*, 539 U.S. 461 (2003), the Section 5 preclearance analysis included no inquiry whatsoever into discriminatory intent. *See* Michael J. Pitts, Georgia v. Ashcroft*: It's the End of Section 5 As We Know It (And I Feel Fine)*, 32 Pepp. L. Rev. 265, 273 (2005). Because the U.S. District Court for the District of Columbia evaluates preclearance requests under the same standards and does not, for example, require a showing of discriminatory intent, resort to statistics reflecting its actions has limited constitutional significance.[13]

Moreover, the Attorney General has regularly objected to changes based on interpretations of Section 5 that were eventually struck down by this Court as impermissible. *See* Richard L. Hasen, *An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization* at 9, Testimony Before the Senate Committee on the Judiciary (May 9, 2006) ("The problem with using objections as evidence of intentional State discrimination is unfortunately even worse than it appears. In the 1990's DOJ adopted a policy of objecting to certain State actions that were perfectly constitutional, a policy the Supreme Court later rejected."). Yet, Congress relied on these to justify the reauthorization of Section 5. H.R. Rep. No. 109-478, at 21-24, 36-40.

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13. Likewise, a jurisdiction's withdrawal of a submission after receiving a "more information" request letter from DOJ has no legal significance since Section 5's standard does not mirror the constitutional standard.

Even if one assumes that each and every one of the Attorney General's objections was based on unconstitutional conduct, the number of objections is itself miniscule and, perhaps more importantly, vanishing. Between 1982 and 2004, 0.71% of all submissions resulted in an objection. The evidence reveals that the objection rate is continuously declining. From 2003 to 2005, the annual objection rate declined from 0.17% to 0.06% to 0.03%. *See* Appx. at 4a-5a; Blum & Campbell at 11. Even the district court below noted "a steady drop in objection rates" culminating in a rate of 0.05% between 1998-2002. *NAMUDNO*, 573 F. Supp. 2d at 250. In no way can the fact that the Attorney General has *objected* to approximately 5 of every 10,000 proposed voting changes be considered evidence of pervasive discrimination sufficient to invoke Section 5's extraordinary remedy.[14]

Finally, Congress touted the fact that Section 5 objections, more information request letters, and enforcement actions prevented such evils as "annexation, at-large voting" and "multi-member districts." While this could be good evidence supporting the need for enforcement legislation if it was shown that a good number of the changes prevented would have

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14. Any showing that jurisdictions have not complied with Section 5's preclearance requirements before instituting changes proves just that; neither Congress nor the district court below showed that any instance of non-compliance was motivated by an intent to deny any protected person or group their right to register or vote. *See NAMUDNO*, 573 F. Supp. 2d at 256-58 (citing H.R. Rep. No. 109-478, at 42).

been unconstitutional,[15] *see Boerne*, 521 U.S. at 532, these are all constitutional ways of conducting local government unless, like any other device, they are adopted with discriminatory intent. *See Bolden*, 446 U.S. at 66-67, 74. Where a state is under no constitutional duty to devise an "optimal" form of voting or government, the state's failure to do so cannot be evidence of unconstitutional behavior. *See Hibbs*, 538 U.S. at 751, 753 (Thomas, J., dissenting).

c. Section 2 and Section 4 Actions

Congress also relied on "the continued filing of section 2 cases that originated in covered jurisdictions" as evidence supporting the need for Section 5. Pub. L. No. 109-246 § 2(b)(4)(C), 120 Stat. at 578. Although decisions finding violations of Section 2 might serve as evidence of unconstitutional conduct since Section 2 is the VRA provision that most closely resembles the constitutional standard for discrimination, *see Katzenbach*, 383 U.S. at 329, the *filing* of a Section 2 suit does not demonstrate more than the plaintiff's contention that a Section 2 violation has occurred. Moreover, Section 5 cannot be justified on the existence of Section 2 litigation given that (1) more successful Section 2 actions have taken place in non-covered jurisdictions than in covered ones since 1982; (2) only approximately a dozen cases have found intentional

15. The district court below found persuasive testimony referencing DOJ objections based on "discriminatory intent." *NAMUDNO*, 573 F. Supp. 2d at 251-54. However, these objections were clearly based on findings of disparate impact, and there are few if any findings of actual intent to discriminate on the basis of race. *See* H.R. Rep. No. 109-478, at 12, 36.

discrimination or constitutional violations in covered jurisdictions since 1982 (thus averaging less than one per year); and (3) these figures include six instances of discrimination against white voters. *See* Blum & Campbell at 11; Edward Blum, *Section 5 of the Voting Rights Act: The Importance of Pre-Clearance*, Testimony Before the House Committee on the Judiciary, Subcommittee on the Constitution (Oct. 25, 2005); S. Rep. No. 109-295, at 13 & App. 1 (2006); *NAMUDNO*, 573 F. Supp. 2d at 258.

d. Federal Examiner and Observer Coverage

In addition, Congress attempted to justify Section 5 because of "counties certified by the Attorney General for Federal examiner and observer coverage and the tens of thousands of Federal observers that have been dispatched to observe elections in covered jurisdictions." Pub. L. No. 109-246 § 2(b)(5), 120 Stat. at 578. But dispatching observers is not the result of actual, state-sponsored discrimination in conducting voting.

Congress and the district court noted that examiners and observers may be dispatched "when there is a reasonable belief that minority citizens are at risk of being disenfranchised." H.R. Rep. No. 109-478, at 44; *NAMUDNO*, 573 F. Supp. 2d at 262. This flimsy evidence[16] cannot possibly support Section 5. It is too

16. The district court relied, at least in part, on anecdotal evidence, which included an incident about a man complaining about being harassed for insisting on casting a vote when he was not even registered to vote. *See NAMUDNO*, 573 F. Supp. 2d at 262.

great a leap to infer the existence of pervasive intentional discrimination from the prophylactic dispatch of federal examiners and observers. A belief of a risk of disenfranchisement is nothing like the record of widespread intentional discrimination before this Court in *Katzenbach*.

e. Minority Representation Below Minority Population

Though careful to note that minorities have made significant gains in winning elected office, Congress found persuasive the fact that an African-American had never been elected to statewide office in three of the six originally covered states. *See* H.R. Rep. No. 109-478, at 18, 33. Congress also found persuasive evidence showing that African Americans accounted for 21% of state legislators in six southern states where the African-American population averages 35%, and that the number of Latino and Asian-Americans elected to office "has failed to keep pace with [the] population growth of those two communities." *Id.* at 33.

Apart from the fact that this factor assumes the existence of racially polarized voting, "[t]he Fifteenth Amendment does not entail the right to have [minority] candidates elected." *Bolden*, 446 U.S. at 65; *id.* at 86 (Stevens, J., concurring). Thus, in order to show a constitutional violation, "it is not enough to show that the group allegedly discriminated against has not elected representatives in proportion to its numbers." *Bolden*, 446 U.S. at 66. Indeed, "[t]he mere fact that [a group] has found itself outvoted and without legislative seats of its own provides no basis for invoking constitutional

remedies where . . . there is no indication that this segment of the population is being denied access to the political system." *Whitcomb v. Chavis*, 403 U.S. 124, 154-55 (1971). And given that, in comparison with the white majority, minority voters are reasonably able to elect candidates of choice, the fact that minorities in some areas have not been elected to public office in proportion to their percentage of the population is no evidence of unconstitutional conduct.[17]

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17. Other testimony focused on "hostility to minority political participation," as evidenced by the "unpacking" of majority-minority districts into "coalition" or "influence" districts at issue in *Georgia v. Ashcroft*, *see Protecting Minority Voters: The Voting Rights Act at Work* at 14-16, Report of the National Commission on the Voting Rights Act (2006), apparently ignoring this Court's explicit finding in *Ashcroft* that this practice could be—and was intended to be—of legitimate benefit to racial minorities. *See Ashcroft*, 539 U.S. at 480. A different report cited photo ID requirements like those recently upheld in *Crawford v. Marion County*, 128 S. Ct. 1610 (2008), as an example of discrimination and hostility to minority political participation justifying Section 5. *The Case for Extending and Amending the Voting Rights Act* at 16-17, American Civil Liberties Union (March 2006). Some other examples of purported discrimination border on the comical. One group cited a refusal to accept "bundled" mail-in voter registration forms, a requirement that candidates for office have a high school diploma or its equivalent, and a prohibition of "for sale" signs in a predominantly white municipality as "examples of discrimination" that demonstrate Section 5's continued necessity. *Id.* at 18-20. Indeed, that group would contend that this lawsuit is itself evidence of racial animus. *See id.* at 20 (stating that lawsuits challenging the constitutionality of the Voting Rights Act are evidence of discrimination).

B. Congress Failed to Impose Meaningful Limitations on Section 5.

Even if Congress did compile sufficient evidence showing that some type of enforcement legislation is both necessary and appropriate, it wholly failed to justify the particular remedy it chose. *See Riley v. Kennedy*, 128 S. Ct. 1970, 1987 (2008) (Stevens, J., dissenting) ("[I]t may well be true that today the statute is maintaining strict federal controls that are not as necessary or appropriate as they once were."). This failure runs afoul of this Court's enforcement clause precedents.

First, Congress failed to appropriately limit Section 5 on a geographic basis. *See* App. Br. at 62-64. In contrast to covering the areas with the worst voting records, reauthorized Section 5 covers many of the States leading the country in minority voter registration and turnout and in numbers of minority elected officials. *See* App. at 6a, 11a. It also covers jurisdictions in which no voting discrimination has ever been found, such as Appellant, *see* App. Br. at 9-10. *Cf. Civil Rights Cases*, 109 U.S. at 14.

Second, Congress did not consider lesser alternatives, including whether Section 2 would provide sufficient protection of minority voting rights or whether the bailout formula should be modified. Section 2 is a self-executing provision of the VRA that is meant to deal with unconstitutional conduct, unlike the anti-evasion focus of Section 5. *See Bossier Parish II*, 528 U.S. at 335. Neither Congress nor the district court made any attempt to explain why Section 2 is not capable of accomplishing its intended purpose, especially given the

absence of evidence showing that the States might resort to the type of schemes that compelled the need for Section 5 in the first place. *See supra* Section II.A.1. Indeed, Congress' citation of the volume and success of Section 2 actions seems to belie any contention that it is not a sufficient remedy. *See Katzenbach*, 383 U.S. at 334-35.

In addition, Congress failed to tailor Section 5 by expanding the bailout provision to ensure that it would reach every political subdivision covered. The *Katzenbach* Court found the availability of bailout to be a meaningful limitation on Section 5's broad remedy, *see id.* at 331-32, but that Court could not have imagined that, 44 years after Section 5's original enactment, only 15 jurisdictions would have successfully terminated coverage. *See also* H.R. Rep. No. 109-478, at 10 (stating, upon renewing Section 5 in 1982, that Congress expected most jurisdictions to have bailed out of coverage by 2007). This is due, at least in part, to the fact that many jurisdictions subject to Section 5 encompass political subdivisions whose preclearance submissions they do not and cannot control. *See* App. Br. at 24-25. Under the district court's interpretation of the VRA's bailout provisions,[18] the bailout mechanism is illusory, and Section 5 is no longer appropriately tailored to the problem it was designed to remedy. In that event, the Court should find Section 5 unconstitutional as applied to any subdivision otherwise covered by Section 5 but not entitled to seek bailout.

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18. As Appellants ably demonstrate, the text and purpose of the bailout provision yield an interpretation that extends the opportunity to seek bailout to all "political subdivisions" in covered states. *See* App. Br. at 15-23.

Third, and finally, Congress could have limited Section 5's reach by imposing a meaningful temporal limitation. *See* App. Br. at 61-62. The fact that previous enactments of Section 5 have been for five, seven, and twenty-five years does not necessarily mean that twenty-five years is appropriate today, but Congress apparently thought that rote recitation of these facts was sufficient. Indeed, Congress apparently plucked the current twenty-five-year extension out of thin air, explaining only that "40 years has not been a sufficient amount of time." Pub. L. No. 109-246 § 2(b)(7), 120 Stat. at 578. The House considered and rejected an amendment that would have limited the period to nine years, but rejected it so that the new Section 5 would cover two full censuses and concomitant redistricting periods—*i.e.*, just enough time to compile evidence to be used to reauthorize Section 5 again. *See* 152 Cong. Rec. H5143-204, H5187 (daily ed. July 13, 2006).

* * *

If there is anything "exceptional" about the conditions existing at the time of reauthorization, it is the amount of progress made since 1964. Despite the erosion of the factual basis that initially served as the constitutional justification for Section 5, some have suggested that Section 5 must be preserved because of its iconic status. *See*, *e.g.*, Jeffrey Toobin, *Voter*, *Beware*, The New Yorker (Mar. 2, 2009) ("[I]n a case to be argued before the Court this spring, the current conservative majority has a chance to undo this signal achievement of American democracy."). But to retire Section 5 is not to diminish its importance. Indeed, *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), perhaps the greatest landmark of our Nation's struggle towards equal rights under the law and one of the great legal landmarks of our entire history, *see* Bruce Ackerman,

The Living Constitution, 120 Harv. L. Rev. 1737, 1750, 1752 (2007), proves the point. Forty-five years after the Court's decision in *Brown*, the district court in which *Brown* began declared that the Topeka school district had achieved unitary status and ceased court supervision of that district. *See Brown v. Unified School District No. 501*, 56 F. Supp. 2d 1212 (D. Kan. 1999). While there may be work left to be done by the Voting Rights Act, that work must be accomplished through narrower means. Section 5 has accomplished its goal and thus is no longer sustainable under the Constitution.

CONCLUSION

For the reasons set forth herein, the judgment of the district court should be reversed.

Respectfully submitted,

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APPENDIX

Voter Registration Rates (1965 v. 1988)

	March 1965			November 1988		
	Black	**White**	**Gap**	**Black**	**White**	**Gap**
Alabama	19.3	69.2	49.9	68.4	75.0	6.6
Georgia	27.4	62.2	35.2	56.8	63.9	7.1
Louisiana	31.6	80.5	48.9	77.1	75.1	-2.0
Mississippi	6.7	69.9	63.2	74.2	80.5	6.3
North Carolina	46.8	96.8	50.0	58.2	65.6	7.4
South Carolina	37.3	75.7	38.4	56.7	61.8	5.1
Virginia	38.3	61.1	22.8	63.8	68.5	4.7

Source: H.R. Rep. No. 109-478 at 12, 109th Cong., 2d Sess. (2006).

APPENDIX B — VOTER REGISTRATION 2004-2008

New Voter Registrations 2004-2008

	Black % of New Registrants	Black % of Voting Age Population	Black % of All Registered Voters (2004)	Black % of All Registered Voters (2008)
North Carolina	34.2	21.1	20.2	21.5
Georgia	43.2	29.2	27.7	30.01
Florida	43.5	13.7	11.9	13.1
Louisiana	52.5	29.3	29.7	30.4

Source: Charles S. Bullock, III & Ronald K. Gaddie, *The Triumph of the Voting Rights Act* (forthcoming 2009).

Voter Turnout 2008

	% Black – All Registered Voters	% Black – Voter Turnout
Georgia	30.01	30.06
Louisiana	30.40	29.50

Source: Charles S. Bullock, III & Ronald K. Gaddie, *The Triumph of the Voting Rights Act* (forthcoming 2009).

APPENDIX D — DOJ OBJECTIONS

Administrative Review of Voting Changes, 1982-2005

All Submissions

Year	Number	Objections	Percent Objections
1982	2,848	66	2.32%
1983	3,203	52	1.62%
1984	3,975	49	1.23%
1985	3,847	37	0.96%
1986	4,807	41	0.85%
1987	4,478	29	0.65%
1988	5,155	39	0.76%
1989	3,920	30	0.77%
1990	4,809	37	0.77%
1991	4,592	75	1.63%
1992	5,307	77	1.45%
1993	4,421	69	1.56%
1994	4,661	61	1.31%
1995	3,999	19	0.48%

Year	Number	Objections	Percent Objections
1996	4,729	7	0.15%
1997	4,047	8	0.20%
1998	4,021	8	0.20%
1999	4,012	5	0.12%
2000	4,638	4	0.09%
2001	4,222	7	0.17%
2002	5,910	21	0.36%
2003	4,829	8	0.17%
2004	5,211	3	0.06%
2005	3,811	1	0.03%
TOTAL	**105,452**	**753**	**0.71%**

Source: Bradley J. Schlozman, "Administrative Review of Voting Changes," Testimony Before the Subcommittee on the Constitution, Committee on the Judiciary, House of Representatives, October 25, 2005. See also H.R. Rep. No. 109-478 at 22, 109th Cong., 2d Sess. (2006).

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APPENDIX E – BULLOCK & GADDIE 2006 REGISTRATION

Voter Registration by Race and Ethnicity

	1980	1982	1984	1986	1988	1990	1992	1994	1996	1998	2000	2002	2004	2006
Alabama														
Black	62.2	57.7	71.4	75.4	68.4	65.3	71.8	66.3	69.2	74.3	72.0	67.6	72.9	71.8
White	73.3	70.2	77.2	74.3	75.0	74.9	79.3	73.3	75.8	74.1	74.5	73.7	73.8	73.0
Non-Hispanic White										74.5	74.9	74.2	74.9	74.5
Arkansas														
Black	62.6	63.3	71.2	62.5	68.0	50.8	62.4	56.0	65.8	51.8	60.0	62.0	63.7	57.5
White	67.4	65.3	70.8	63.5	67.9	62.6	67.8	61.0	64.5	65.9	59.5	62.9	67.1	65.0
Non-Hispanic White										66.3	60.5	64.4	69.4	68.4
Florida														
Black	58.2	50.3	57.3	61.3	57.7	53.3	54.7	47.2	64.6	50.4	52.7	47.9	52.6	50.3
White	64.1	60.8	64.1	59.9	64.3	59.5	64.5	57.6	67.8	61.1	62.5	60.7	64.7	58.1
Latino	33.7	25.3	33.2	35.5	37.7	32.3	35.0	22.7	36.7	35.8	37.1	39.1	38.2	32.2
Non-Hispanic White										67.0	69.2	66.6	71.8	66.3
Georgia														
Black	59.8	51.9	58.0	55.3	56.8	57.0	53.9	57.6	64.6	64.1	66.3	61.6	64.2	57.9
White	67.0	59.7	65.7	60.4	63.9	58.1	67.3	55.0	67.8	62.0	59.3	62.7	63.5	62.1
Non-Hispanic Whites										63.1	61.0	65.3	68.0	67.9
Louisiana														
Black	69.0	68.5	74.8	71.9	77.1	72.0	82.3	65.7	71.9	69.5	73.5	73.5	71.1	66.9
White	74.5	67.5	73.2	71.4	75.1	74.1	76.2	72.7	74.5	75.2	77.5	74.2	75.1	73.2
Non-Hispanic White										75.6	78.0	75.6	76.6	75.0

Mississippi														
Black	72.2	75.8	85.6	75.9	74.2	71.4	78.5	69.9	67.4	71.3	73.7	67.9	76.1	72.2
White	85.2	76.9	81.4	77.3	80.5	70.8	80.2	74.6	75.0	75.2	72.2	70.7	72.3	69.2
Non-Hispanic White										75.8	72.6	72.1	73.6	70.7
N. Carolina														
Black	49.2	43.6	59.5	57.1	58.2	60.1	64.0	53.1	65.5	57.4	62.9	58.2	70.4	61.1
White	63.7	62.5	67.0	65.8	65.6	63.6	70.8	63.9	70.4	65.6	67.9	63.1	69.4	65.9
Non Hispanic White										66.9	71.5	66.2	73.2	71.1
S. Carolina														
Black	61.4	53.3	62.2	58.8	56.7	61.9	62.0	59.0	64.3	68.0	68.6	68.3	71.1	67.8
White	57.2	54.5	57.3	56.4	61.8	56.2	69.2	62.6	69.7	67.9	68.2	66.2	74.4	60.2
Non-Hispanic White										68.0	69.8	68.2	75.5	63.5
Tennessee														
Black	69.4	67.1	78.5	73.0	74.0	68.5	77.4	70.0	65.7	64.8	64.9	54.1	63.9	53.5
White	66.9	68.5	70.2	65.0	64.4	63.3	63.4	63.9	66.3	63.9	61.9	62.3	62.6	63.8
Non-Hispanic White										63.9	62.8	65.2	64.1	65.9
Texas														
Black	56.4	56.6	65.3	66.6	64.2	60.0	63.5	58.5	63.2	62.1	69.5	65.1	68.4	62.4
White	61.4	59.4	66.0	58.2	66.5	61.1	66.1	59.7	62.7	59.7	61.8	57.7	61.5	59.7
Latino	39.3	43.2	45.2	43.1	45.5	40.0	42.9	39.2	42.7	39.7	43.2	39.1	41.5	40.0
Latino Citizens										56.2	60.0	56.2	58.8	58.1
Non-Hispanic Black										64.4	69.4	66.2	NA	NA
Non-Hispanic White										69.4	71.8	70.2	73.6	71.5
Virginia														
Black	49.7	53.6	62.1	66.5	63.8	58.1	64.5	51.1	64.0	53.6	58.0	47.5	57.4	52.0
White	65.4	60.8	63.7	63.3	68.5	61.9	67.2	63.6	68.4	63.5	67.6	64.1	68.2	65.5
Non-Hispanic White										64.7	69.1	66.7	71.6	69.8

Original Seven State Median														
Black	61.4	53.6	62.2	66.5	63.8	61.9	64.5	59.0	65.5	68.0	68.6	67.6	71.1	66.9
White	67.0	62.5	67.0	65.8	68.5	63.6	70.8	63.9	70.4	67.9	68.2	66.2	72.3	66.9
Non-South														
Black	60.6	61.7	67.2	63.1	65.9	58.4	63.0	58.3	62.0	58.5	61.7	57.0	63.3	53.6
White	69.3	66.7	70.5	66.2	68.5	64.4	70.9	65.6	68.1	63.9	65.9	63.0	68.5	64.2
Non-Hispanic White									72.2	68.2	70.3	67.8	74.3	69.7
Latino	35.5	33.9	39	33.2	32.4	30.4	32.9	29.1	33.8	31.9	32.7	30.6	33.4	32.1

Source: Charles S. Bullock, III & Ronald K. Gaddie, *The Triumph of the Voting Rights Act* (forthcoming 2009) (based on U.S. Census Bureau data)

Table B.2. Voter turnout data by race and ethnicity

<Insert rule>

	1980	1982	1984	1986	1988	1990	1992	1994	1996	1998	2000	2002	2004	2006
<Insert rule>														
Alabama														
Black	48.9	41.2	54.8	55.2	52.4	45.7	58.1	53.5	54.3	51.6	57.2	43.3	63.9	47.8
White	59.2	52.0	62.8	52.5	58.4	52.7	65.9	64.3	56.3	51.6	60.8	50.7	62.2	49.6
Non-Hispanic White										51.9	61.1	51.3	63.1	50.5
Arkansas														
Black	50.8	47.7	56.9	43.3	49.6	34.5	46.4	34.5	50.6	31.1	52.2	44.0	49.4	34.0
White	58.6	54.3	61.5	47.9	57.3	48.2	60.7	43.1	52.1	45.0	49.0	46.1	58.6	46.2
Non-Hispanic White										45.4	50.5	47.3	60.8	48.7
Florida														
Black	50.3	30.4	43.2	42.4	40.8	37.4	46.3	30.0	40.5	33.4	42.3	33.0	44.5	33.5
White	56.5	43.1	55.5	47.5	57.1	44.9	57.9	46.2	52.7	40.6	53.8	44.8	58.4	39.7
Latino	29.3	18.6	29.1	28.0	34.1	22.8	30.5	20.1	29.0	22.9	31.4	27.4	34.0	18.0
Non-Hispanic White										44.8	59.8	49.5	64.0	46.7
Georgia														
Black	43.7	32.5	45.9	37.3	42.4	42.3	47.1	30.9	45.6	40.2	51.6	38.5	54.4	38.6
White	56.0	40.7	55.3	40.5	53.2	42.6	58.7	38.3	52.3	36.8	48.3	41.4	53.6	42.2
Non-Hispanic White										37.6	49.6	43.0	57.4	46.2
Louisiana														
Black	60.1	32.0	66.4	55.8	61.5	55.9	71.5	30.9	60.9	46.0	63.2	46.9	62.1	36.1
White	65.6	23.6	64.7	57.5	67.5	50.2	68.3	35.6	62.6	35.7	66.4	51.0	64.0	40.9
Non-Hispanic White										36.2	67.3	52.1	65.2	41.6
Mississippi														
Black	59.5	50.8	69.6	40.2	60.3	32.5	61.9	41.7	48.8	40.4	58.5	40.2	66.8	50.5
White	70.9	52.4	69.2	45.8	64.2	35.8	69.4	46.2	59.3	40.7	61.2	43.6	58.9	38.8
Non-Hispanic White										41.1	61.9	44.6	60.0	39.7
N.Carolina														
Black	38.8	30.4	47.2	39.1	46.6	48.1	54.1	28.3	48.7	38.2	47.6	42.2	63.1	31.8
White	55.9	41.7	59.1	47.1	55.2	49.9	62.4	38.4	56.4	40.5	55.9	43.5	58.1	40.0
Non-Hispanic White										41.5	58.9	45.7	61.5	43.4

S.Carolina														
Black	51.3	38.9	51.4	42.0	40.7	44.6	48.8	38.7	49.9	42.8	60.7	48.7	59.5	48.9
White	51.7	37.0	47.9	41.3	52.3	42.0	61.6	49.4	56.2	48.8	58.7	45.1	63.4	41.2
Non-Hispanic White										49.3	60.0	46.4	64.3	43.5
Tennessee														
Black	56.9	50.8	64.7	46.0	57.9	35.3	62.9	38.5	56.0	39.0	52.6	39.8	51.3	38.5
White	56.7	46.6	56.7	43.8	50.7	29.7	54.8	44.5	52.8	35.8	52.3	45.8	53.5	45.6
Non-Hispanic White										36.0	53.3	48.0	54.8	47.2
Texas														
Black	40.7	37.8	51.2	39.8	47.0	38.7	50.1	33.1	47.1	35.5	57.5	44.3	55.8	35.3
White	52.7	40.6	55.5	37.5	55.2	42.5	57.2	39.4	46.7	33.5	48.1	35.0	50.6	34.3
Latino	29.7	26.8	32.7	23.6	33.2	22.5	33.1	18.9	27.9	15.3	29.5	19.1	29.3	17.5
Latino Citizens										21.8	41.0	27.4	41.6	25.4
Non-Hispanic Black										36.7	57.8	45.1	NA	NA
Non-Hispanic White										42.4	57.9	45.7	63.4	44.4
Virginia														
Black	42.9	44.3	55.0	42.5	47.7	32.0	59.0	33.8	53.3	23.8	52.7	27.2	49.6	34.6
White	58.3	46.2	57.8	36.8	61.1	39.6	63.4	50.4	58.5	32.4	60.4	37.8	63.0	47.7
Non-Hispanic White										33.3	61.8	39.6	66.2	51.0
Original Seven States														
Black	48.9	38.9	54.8	42.0	47.7	44.6	58.1	33.8	49.9	40.4	57.2	42.2	62.1	38.6
White	58.3	41.7	59.1	45.8	58.4	42.6	63.4	46.2	56.4	40.5	60.4	44.8	62.2	41.2
Non-South														
Black	52.8	48.5	58.9	44.2	55.6	38.4	53.8	40.2	51.4	40.4	53.1	39.3	56.7	38.0
White	62.4	53.1	63.0	48.7	60.4	48.2	64.9	49.3	57.4	45.4	57.5	44.7	61.8	48.0
Non-Hispanic Whites										48.6	61.6	48.6	67.3	52.5
Latino	29.8	25.8	32.8	23.8	26.8	20.5	27.4	20.8	26.3	21.4	26.8	18.2	28.2	21.3
Nationwide														
Latino Citizens										32.8	45.1	30.4	47.2	32.3

<insert rule>

Source: U.S. Census Bureau data

APPENDIX F – BULLOCK & GADDIE 2006 TURNOUT

Voter Turnout by Race and Ethnicity

	1980	1982	1984	1986	1988	1990	1992	1994	1996	1998	2000	2002	2004	2006
Alabama														
Black	48.9	41.2	54.8	55.2	52.4	45.7	58.1	53.5	54.3	51.6	57.2	43.3	63.9	47.8
White	59.2	52.0	62.8	52.5	58.4	52.7	65.9	64.3	56.3	51.6	60.8	50.7	62.2	49.6
Non-Hispanic White										51.9	61.1	51.3	63.1	50.5
Arkansas														
Black	50.8	47.7	56.9	43.3	49.6	34.5	46.4	34.5	50.6	31.1	52.2	44.0	49.4	34.0
White	58.6	54.3	61.5	47.9	57.3	48.2	60.7	43.1	52.1	45.0	49.0	46.1	58.6	46.2
Non-Hispanic White										45.4	50.5	47.3	60.8	48.7
Florida														
Black	50.3	30.4	43.2	42.4	40.8	37.4	46.3	30.0	40.5	33.4	42.3	33.0	44.5	33.5
White	56.5	43.1	55.5	47.5	57.1	44.9	57.9	46.2	52.7	40.6	53.8	44.8	58.4	39.7
Latino	29.3	18.6	29.1	28.0	34.1	22.8	30.5	20.1	29.0	22.9	31.4	27.4	34.0	18.0
Non-Hispanic White										44.8	59.8	49.5	64.0	46.7
Georgia														
Black	43.7	32.5	45.9	37.3	42.4	42.3	47.1	30.9	45.6	40.2	51.6	38.5	54.4	38.6
White	56.0	40.7	55.3	40.5	53.2	42.6	58.7	38.3	52.3	36.8	48.3	41.4	53.6	42.2
Non-Hispanic White										37.6	49.6	43.0	57.4	46.2

Louisiana														
Black	60.1	32.0	66.4	55.8	61.5	55.9	71.5	30.9	60.9	46.0	63.2	46.9	62.1	36.1
White	65.6	23.6	64.7	57.5	67.5	50.2	68.3	35.6	62.6	35.7	66.4	51.0	64.0	40.9
Non-Hispanic White										36.2	67.3	52.1	65.2	41.6
Mississippi														
Black	59.5	50.8	69.6	40.2	60.3	32.5	61.9	41.7	48.8	40.4	58.5	40.2	66.8	50.5
White	70.9	52.4	69.2	45.8	64.2	35.8	69.4	46.2	59.3	40.7	61.2	43.6	58.9	38.8
Non-Hispanic White										41.1	61.9	44.6	60.0	39.7
N.Carolina														
Black	38.8	30.4	47.2	39.1	46.6	48.1	54.1	28.3	48.7	38.2	47.6	42.2	63.1	31.8
White	55.9	41.7	59.1	47.1	55.2	49.9	62.4	38.4	56.4	40.5	55.9	43.5	58.1	40.0
Non-Hispanic White										41.5	58.9	45.7	61.5	43.4
S.Carolina														
Black	51.3	38.9	51.4	42.0	40.7	44.6	48.8	38.7	49.9	42.8	60.7	48.7	59.5	48.9
White	51.7	37.0	47.9	41.3	52.3	42.0	61.6	49.4	56.2	48.8	58.7	45.1	63.4	41.2
Non-Hispanic White										49.3	60.0	46.4	64.3	43.5
Tennessee														
Black	56.9	50.8	64.7	46.0	57.9	35.3	62.9	38.5	56.0	39.0	52.6	39.8	51.3	38.5
White	56.7	46.6	56.7	43.8	50.7	29.7	54.8	44.5	52.8	35.8	52.3	45.8	53.5	45.6
Non-Hispanic White										36.0	53.3	48.0	54.8	47.2

Texas													
Black	40.7	37.8	51.2	39.8	47.0	38.7	50.1	33.1	47.1	35.5	57.5	44.3	55.8	35.3
White	52.7	40.6	55.5	37.5	55.2	42.5	57.2	39.4	46.7	33.5	48.1	35.0	50.6	34.3
Latino	29.7	26.8	32.7	23.6	33.2	22.5	33.1	18.9	27.9	15.3	29.5	19.1	29.3	17.5
Latino Citizens										21.8	41.0	27.4	41.6	25.4
Non-Hispanic Black										36.7	57.8	45.1	NA	NA
Non-Hispanic White										42.4	57.9	45.7	63.4	44.4
Virginia														
Black	42.9	44.3	55.0	42.5	47.7	32.0	59.0	33.8	53.3	23.8	52.7	27.2	49.6	34.6
White	58.3	46.2	57.8	36.8	61.1	39.6	63.4	50.4	58.5	32.4	60.4	37.8	63.0	47.7
Non-Hispanic White										33.3	61.8	39.6	66.2	51.0
Original Seven States														
Black	48.9	38.9	54.8	42.0	47.7	44.6	58.1	33.8	49.9	40.4	57.2	42.2	62.1	38.6
White	58.3	41.7	59.1	45.8	58.4	42.6	63.4	46.2	56.4	40.5	60.4	44.8	62.2	41.2
Non-South														
Black	52.8	48.5	58.9	44.2	55.6	38.4	53.8	40.2	51.4	40.4	53.1	39.3	56.7	38.0
White	62.4	53.1	63.0	48.7	60.4	48.2	64.9	49.3	57.4	45.4	57.5	44.7	61.8	48.0
Non-Hispanic Whites										48.6	61.6	48.6	67.3	52.5
Latino	29.8	25.8	32.8	23.8	26.8	20.5	27.4	20.8	26.3	21.4	26.8	18.2	28.2	21.3
Nationwide														
Latino Citizens										32.8	45.1	30.4	47.2	32.3

Source: Charles S. Bullock, III & Ronald K. Gaddie, *The Triumph of the Voting Rights Act* (forthcoming 2009) (based on U.S. Census Bureau data)